BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 20080001

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY JAY SHERRITT REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY ROCKY MOUNTAIN FIRE DISTRICT

On February 11, 2008, Complainant Jay Sherritt ("Sherritt") filed a complaint with the Colorado Secretary of State against Rocky Mountain Fire Protection District ("RMF" or "the District"), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.,* C.R.S. (2007) ("the FCPA"), specifically, Section 1-45-117. The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on February 14, 2008, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter March 17, 2008. The hearing was digitally recorded in Courtroom 1. Sherritt participated personally and represented himself. The Fire District was represented by Frederick Huff, Esq. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2007).

ISSUE PRESENTED

Immediately prior to the November 6, 2007 election, RMF mailed a letter to registered voters concerning ballot issue 5A, a measure designed to exempt the District from the TABOR amendment to the Colorado Constitution and the 5.5% limit imposed by Section 29-1-301, C.R.S. (2007). The issue to be determined is whether, in so doing, the RMF violated Section 1-45-117 of the FCPA by expending public funds or making contributions "to urge electors to vote in favor of" a covered ballot issue or measure.

FINDINGS OF FACT

1. Sherrit is a resident of the town of Boulder, Colorado.

2. RMF was created in 2006 when voters approved a consolidation of the Cherryvale Fire Protection District and the Eldorado Springs/Marshall Fire Protection District. RMF formally commenced operations on January 1, 2007. It provides fire,

rescue, and emergency medical services to its district, consisting of approximately 60 square miles and 40,000 residents.

3. Prior to their consolidation as RMF, Cherryvale Fire Protection District and the Eldorado Springs/Marshall Fire Protection District were both exempted, pursuant to voter approval, from the operation of the Taxpayer's Bill of Rights (also known as "TABOR"), as contained in Article X, Section 20 of the Colorado Constitution, and the 5.5% limit contained in Section 29-1-301, C.R.S.

4. Ballot issue 5A was referred to District voters for the November 6, 2007 election by RMF's board of directors, seeking approval for the same exemptions from TABOR and the 5.5% limit contained in Section 29-1-301 for RMF (commonly referred to as a "de-Brucing" measure, in reference to the author of the TABOR amendment) that were in effect for the District's predecessors.

5. As agreed by the parties, issue 5A was a ballot issue as defined in Section 1-1-104(2.3), C.R.S. and a referred measure as defined in Section 1-1-104(34.5), C.R.S. seeking a voter-approved revenue change pursuant to Section 20(7) of Article X of the Colorado Constitution.

6. Ballot issue 5A was placed on the ballot in accordance with Section 1-41-103(1)(d), (2), (3), and (4).[1]

7. It is undisputed that RMF is a political subdivision of the state.

8. It is undisputed that as a political subdivision of the state RMF receives public moneys to operate.

9. On or about October 26, 2007, RMF mailed a letter to registered voters in the District concerning ballot issue 5A ("the October ballot issue 5A letter"). Some, but not all, of these mailings included an additional letter not directly related to the issue in this proceeding. The additional letters were sent to registered voters within the District residing in Eldorado Springs (one version of the additional letter) and Superior (a different version of the additional letter).[2] The remaining voters in the District received only the ballot issue 5A letter in this mailing.

[1] These provisions relate to local ballot issue elections in odd-numbered years and include questions referred to voters by the governing body of the local government, including a special district. Ballot issue 5A constituted a local government matter arising under Section 20 of Article X of the state constitution because it addressed approval of revenue changes pursuant to Section 20(7) of Article X of the Colorado Constitution and approval of the weakening of a local limit on revenue, spending, and debt pursuant to Section 20(1) of Article X of the Colorado Constitution, as provided in Section 1-41-103(4)(d) and (4)(f).

[2] The additional letters discussed favorable changes in Insurance Services Office ratings recently received by RMF for Eldorado Springs and Superior, two areas within the District. The additional letters were sent only to voters residing in those areas.

10. The ballot issue 5A mailing appeared on RMF letterhead, was dated October 26, 2007, and was addressed to "Valued Customer of Rocky Mountain Fire." It included only positive comments concerning the proposal, as follows:

> In 2006, the voters in the Eldorado Springs/Marshall Fire Protection District and those in the Cherryvale Fire Protection District approved the consolidation of the existing fire districts. Over the past year, this consolidation has to be very beneficial to the residents of both areas.
>
> On November 6th of this year, you will be asked to vote on ballot issue 5A, a measure to exempt your fire department, Rocky Mountain Fire, from the effects of TABOR and the ("5.5%Limit") laws. Prior to the consolidation of Eldorado Springs Fire Protection District and Cherryvale Fire Protection District, both departments were exempt from the effects of TABOR and the ("5.5%") Law and this ballot issue will allow that status to continue with Rocky Mountain Fire.
>
> Your fire department provides fire, rescue, and emergency services 24 hours a day, seven days a week to a nearly 60-square mile area which includes residential, rural industrial, commercial, wildland and mountain properties. There are approximately 40,000 residents in the District according to the most recent (2000) census data. The District is still experiencing growth which in turn, increases the demand for services.
>
> The passage of 5A will allow the District to maintain the steady and predictable revenue stream necessary to support its mission to provide top quality fire, rescue and emergency services to you and your property, 24 hours a day seven days a week, by exempting the District from the ratchet down effects of TABOR and Section 29-1-301 Colorado Revised Statutes ("5% Limit") or any other law.
>
> If 5A is not successful, the amount of revenue generated from taxes, grants and investments will be limited and subsequently, have an effect on the services provided to the District. Once again, prior to the creation of the Rocky Mountain Fire Protection District, both Eldorado Springs/Marshall and Cherryvale were, with voter approval, exempt from the effects of TABOR, the 5.5% Limit or any other law for many years. This ballot issue will not increase your taxes; it will simply allow this exemption to continue into the future.

The letter concluded by inviting recipients to call Rocky Mountain Fire if they had any questions and was signed by "Board of Directors, Rocky Mountain Fire." The letter also included the statement:" This letter was sent in compliance with Colorado Revised Statutes."

11. Prior to the November 6, 2007 election, the Boulder County Clerk and Recorder mailed to Boulder County voters a booklet containing summary statements regarding ballot propositions appearing on the November 6, 2007 ballot ("TABOR notice"), as required by Article X, Section 20 of the Colorado Constitution. The TABOR notice included a summary of written comments in favor of issue 5A, which were quite similar to the District's October ballot 5A letter.[3] In fact, with the exception of one sentence, all statements contained in the favorable TABOR notice comments were also contained in the ballot 5A letter in essentially verbatim fashion, although in a slightly different order.[4] The only item in the TABOR notice that was not also included in the October ballot issue 5A letter was the statement: "The same exemption [as previously provided to the District's predecessors] should be granted to Rocky Mountain Fire Protection District."

12. On November 1, 2007, Mailgraphics, Inc. of Boulder, Colorado issued an invoice to RMF in the amount of $1,910.61 for printing, folding, setting up and postage for three versions of a mailing, to be sent to "Eldorado," "Superior" and to "reg voters." The invoice includes a credit of "$3,483.69" for "postage paid—check #1837." Also on November 1, 2007, the U.S. Postal Service issued three statements to Mailgraphics for postage in the total amount of $3,483.69 with respect to three mailings prepared for RMF.

13. RMF does not assert it sent any mailings to voters on or about October 26, 2007 other than the ballot 5A letter (and accompanying ISO rating letter to certain voters). The ALJ draws the reasonable inference that RMF spent a minimum of $1,910.61 plus mailing costs of $3,483.69 in connection with the October ballot 5A mailing.

DISCUSSION

Article XXVIII of the Colorado Constitution, adopted as an initiated measure by the voters of Colorado in 2002, in combination with the FCPA, together comprise Colorado's campaign finance law. Sherritt contends RMF violated these provisions as they relate to expenditures or contributions by public entities. Specifically, Sherritt maintains that mailing the October ballot issue 5A letter to District residents, RMF expended public moneys or made a contribution to urge electors to vote in favor of the ballot issue, in violation of Section 1-45-117(1)(a)(I)(C) of the FCPA.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act. In such a proceeding, the

[3] No comments against ballot issue 5A were included in the TABOR notice because none had been filed within the constitutional deadline.

[4] The October ballot issue 5A letter was slightly longer than the TABOR summary and thus contained several sentences that were not included in the TABOR summary.

proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Sherritt is the complaining party and therefore bears the burden of proof to establish a violation of Colorado's campaign finance law, as alleged in his complaint. The sole issue in dispute in this case is whether the October ballot issue 5A letter "urged" voters to vote in favor of the ballot proposal. The ALJ concludes the letter did urge District voters to vote in favor of the proposal and thus the issuance of the letter using public funds constituted a violation of the FCPA.

A.

Section 1-45-117(1)(a)(I) provides in pertinent part:

> No . . . political subdivision [of the state] shall . . . expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any:
>
> (C) Referred measure, as defined in section 1-1-104(34.5);

It is undisputed that RMF is a political subdivision of the state and that RMF expended public funds to send the October ballot issue 5A letter to District residents.[5] Thus, the only issue presented is whether the letter "urged" District residents to vote in favor of the ballot issue.

Sherritt asserts the letter constitutes urging a favorable vote because it contains only favorable comments concerning the ballot issue and no comments or arguments against the proposal. In support of this assertion, Sherritt points to the fact that the letter essentially restates the favorable arguments for the proposal contained in the TABOR notice, including a verbatim recitation of the paragraph that begins: "The passage of 5A will allow the District to maintain the steady and predictable revenue stream necessary to support [the District's] mission." He also points to the fact that the letter identifies potential negative consequences that will result if the ballot issue is not passed and includes an assertion that the issue will not increase taxes but will simply extend the prior TABOR exemption. Sherritt contends that in the absence of any contrary arguments pointing out potential negative consequences from the passage of the ballot issue, the cumulative effect of the letter is to urge a favorable vote. He maintains the October ballot issue 5A letter was a campaign letter that had no purpose other than to convince District voters to approve the measure, in violation of Section 1-45-117(1)(a)(I)(C).

[5] In order to constitute a violation of Section 1-45-117(1)(a)(I), a governmental agency must "expend . . . public moneys" or "make any contributions" in connection with urging voters for or against a ballot measure. RMF does not contest the fact that it spent public money to finance the production and mailing of the letter, and the evidence was clear that such spending in fact occurred. Under these circumstances, the element of "expend[ing]" public moneys has been satisfied.

RMF argues, in contrast, that the letter complies with the requirements of FCPA because it is merely informational and does not advocate or urge passage of the ballot proposal and thus does not pass the threshold test to constitute prohibited "urging." Instead, according to RMF, the letter, which it admits promotes RMF itself, merely informs voters that they are being asked to vote on the measure and explains what will occur if the measure passes and what will occur if the measure fails, without advocating or encouraging District electors to vote in a specific way. RMF asserts the letter was not intended as an advocacy piece and that in crafting the letter is was the intent of RMF to comply with FCPA requirements.

In construing a constitutional provision, courts and the ALJ are bound to give effect to the intent of the electorate. To do so, the ALJ should give effect to the plain and ordinary meaning of the words used. *Rutt v. Poudre Education Association,*151 P.3d 585 (Colo. App. 2006). Additionally, consideration should be given to the object to be accomplished and the mischief sought to be prevented by the provision. *City of Aurora v. Acosta,* 892 P.2d 264 (Colo. 1995). In construing the provision, the ALJ must therefore look to the plain and ordinary meaning of the word "urge" and give effect to the purpose of Section 1-45-117(1)(a)(I), which is prevent the state and political subdivisions from devoting public resources toward persuading voters during an election. *Coffman v. Common Cause*, 102 P.3d 999, 1007 (Colo. 2004).

In light of these considerations, the ALJ concludes that the October ballot issue 5A letter did urge voters to vote in favor of ballot issue 5A in violation of Section 1-45-117(1)(a)(I)(C). The letter includes an entirely favorable description of the ballot issue and the consequences of exemption from TABOR and the effects of Section 29-1-301, C.R.S. and the "5% limit." Tracking the exact language of the favorable TABOR notice arguments, the letter indicates passage of the proposal will allow RMF to maintain steady revenue levels required to provide services to District residents "24 hours a day seven days a week." It also warns that if the proposal is not passed, RMF funds will be limited, resulting in a (negative) impact on services the District will be able to provide. Additionally, the letter contains no arguments against the proposal. As a document that includes only positive information, the letter has the effect of recommending and encouraging voters to support the ballot issue and thus urges a vote in favor of the ballot issue in violation of Section 1-45-117(1)(a)(I)(C).

The Colorado Court of Appeals has recently had occasion to construe the meaning of the term "urge" as contained in Section 1-45-117(1)(a)(I) in *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4,* 107 P.2d 1140 (Colo. App. 2004). In *Skruch,* five Highlands Ranch metropolitan districts approved public expenditures for preparation, printing and mailing of brochures to residents of Highlands Ranch explaining a bond election ballot initiative for various improvements to the Highlands Ranch community. As determined by the administrative law judge in that case and the Court, the brochure was "entirely a positive description" of the proposed improvement projects and "contained no argument against the projects." The administrative law judge in *Skruch* noted that the brochure "had the effect of encouraging Highlands Ranch

residents to support" the project. Agreeing with these findings, the Court determined the brochure urged voters to vote for the initiative, in violation of the prohibitions of Section 1-45-117(1)(a)(I).

The October ballot issue 5A letter at issue in this case is comparable to the brochure in *Skruch* because it, too, contains only positive comments concerning the proposed ballot issue, thereby taking a position exclusively in favor of the issue. The letter explains in glowing terms what can be accomplished if the ballot issue is passed ("passage of 5A will allow the District to maintain the steady and predictable revenue stream necessary to . . . provide top quality fire, rescue and emergency services to you and your property") and suggests negative consequences if the measure fails to pass ("if 5A is not successful, the amount of revenue generated from taxes, grants and investments will be limited and subsequently, have an effect on the services provided to the District"). Additionally, the letter touts the fact that: "This ballot issue will not increase your taxes; it will simply allow this exemption to continue into the future," as a further positive feature of ballot proposal. Under these circumstances, the ALJ concludes the October ballot issue 5A issue conveyed the message that the ballot issue should be approved and had the effect of encouraging a "yes" vote on the issue. Therefore, the letter, issued by a political subdivision and utilizing and expending public moneys, urged electors to vote in favor of ballot issue 5A, in violation of Section 1-45-117(1)(a)(I)(C), which was enacted to prevent governmental entities from utilizing public funds to improperly affect the outcome of elections.

B.

RMF asserts that its letter did not "urge" a favorable vote and thus was in compliance with FCPA because it did not expressly advocate a favorable vote on the ballot issue. This argument was explicitly rejected by the Court of Appeals in *Skruch. Skruch* looked to the commonly understood definition of "urge," citing the definition found in Webster's New Collegiate Dictionary 1287 (1974), which defines "urge" as "to present, advocate, demand earnestly or pressingly," and found that the brochure at issue in that case met the dictionary definition. The Court also cited case law from other states addressing similar statutory language, including *Schulz v. State*, 14 Misc. 2d 677, 678, 561 N.Y.S.2d 377, 378 (N.Y. Sup. Ct. 1990) *aff'd* 175 A.D.2d 356, 572 N.Y.S.2d 434 (1991). In finding a pamphlet addressing an environment quality bond act improperly used state funds to promote a bond act, *Schulz* determined language in the pamphlet such as "Keep New York Clean and Green" and "It [the act] is the ultimate selfless act" improperly conveyed the message that the bond act should be approved.

The letter at issue here, like the brochure in *Skruch* and the pamphlet in *Schulz,* has the effect of communicating the message that the ballot issue in question should be passed. Thus, the letter here, like the brochure in *Skruch*, meets the commonly

understood definition of "urge" for the reasons stated above, even in the absence of "express advocacy" language.[6]

Also of assistance in determining the appropriate definition for the word "urge" in Section 1-45-117(1)(a)(I) is Section 1-45-117(1)(b)(I). This section provides that a political subdivision may expend public money to dispense a factual summary under the following circumstances:

> Nothing in this subsection (1) shall be construed as prohibiting . . . any political subdivision [of the state] from expending public moneys or making contributions to dispense a factual summary, which shall include arguments both for and against the proposal, on any issue of official concern before the electorate in the jurisdiction. Such a summary shall not contain a conclusion or opinion in favor of or against any particular issue.

Thus, although political subdivisions may not make expend public moneys or make contributions to urge a vote in favor of or against an issue, governmental entities may issue a factual summary of a ballot issue, but only if the summary includes arguments both for and against a proposal and does not contain an opinion in favor of or against the proposal. The limited nature of this exemption provides further evidence of the intent of the FCPA to assure governmental agencies do not unfairly interfere, through the use of public funds, with the election process. The October ballot 5A letter did not comply with this requirement because it failed to include any arguments against the measure. It therefore did not comply with the stringent prohibition against government spending to influence elections contained in the FCPA.

As noted in *Coffman* at 1007, the FCPA "regulates expenditure of public monies by state agencies, departments, officials and employees to prevent the state machinery from thwarting the electoral process." The underlying purpose of these provisions is to assure that inappropriate government power is not brought to bear to interfere in elections. *See, Mountain States Legal Foundation v. Denver School District #1*, 459 F. Supp. 357, 360 (D. Colo. 1978) (citing a California Supreme Court opinion which emphasized a "uniform judicial reluctance to sanction the use of public funds for election campaigns," based on an "implicit recognition" that such expenditures "raise potentially serious constitutional questions") (decided under a prior version of the FCPA). Because

[6] Although the *Skruch* Court at one point noted the brochure involved in that case "expressly advocated" passage of the bond issue, in fact the Court's decision references only the following brochure language: "The Enhance the Ranch Committee recommended that the Metro Districts hold a bond election to provide funds for these projects." This statement is merely an account of historical facts and does not amount to a statement on the part of the Metro Districts expressly advocating a vote in favor of the bond issue. Thus, there is no recitation in the *Skruch* decision itself of any brochure language that constitutes an express exhortation to vote for the proposal. Additionally, a review of the administrative law judge's Agency Decision in *Skruch*, which includes verbatim portions of the brochure's narrative, indicates the brochure did not include any express advocacy language.

the purpose of Section 1-45-117 is to avoid governmental coercion in the elections process, *Coffman* at 1009, "when public funds are used to inform the public about a pending ballot measure, the information presented must represent both sides of the issue." *Skruch* at 1143. In this case, the District expended public funds to issue the October ballot issue 5A letter, which presented solely favorable information concerning ballot measure, did not comply with the FCPA exemption found at Section 1-45-117(1)(a)(I)(B), and urged voters to vote in favor of the measure, in violation of the provisions of Section 1-45-117(1)(a)(I)(C).

C.

As provided by Section 1-45-117(4), any violation of Section 1-45-117 shall be subject to sanctions authorized in Section 1-45-113 or by any appropriate order or relief. Section 1-45-113 has been repealed. However, pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a), the ALJ is authorized to conduct a hearing concerning alleged violations of various portions of the FCPA including Section 1-45-117, and, following a determination that a violation has occurred, may include any appropriate order, sanction or relief authorized by Colo. Const., Art. XXVIII.

Relying on Colo. Const., Art. XXVIII, Section 10, Sherritt seeks the imposition of a civil penalty in the amount of $11,857.11, representing a civil penalty that is three times the illegal expenditure made by RMF, according to Sherritt's calculation. Colo. Const., Art. XXVIII, Section 10 provides that any person who violates any provision of Art. XXVIII relating to contribution or voluntary spending limits shall be subject to a civil penalty of at least double and up to five times "the amount contributed, received or spent" in violation of the applicable provision of article XXVII.

The ALJ declines to impose a fine in the amount proposed by Sherritt for several reasons. First, it is not clear that the provisions of Colo. Const., Art. XXVIII, Section 10 are applicable to this case, which involves a violation of the FCPA's public expenditure prohibitions but does relate to "contribution or voluntary spending limits." Additionally, imposition of a fine of that magnitude would not be appropriate here. Imposition of such a large fine would have the effect of compounding the existing violation because, as a public entity, RMF must ultimately resort to public funds to satisfy any fine imposed in this matter. Furthermore, such a large fine is not appropriate here because it appears RMF attempted to comply with the FCPA, but misconstrued it. There is also no evidence of any prior violations of the FCPA by RMF.

Under these circumstances, the Administrative Law Judge, pursuant to authority under Colo. Const., Art. XXVIII, Section 9(2)(a) to impose an "appropriate order, sanction or relief" imposes a fine on RMF in the amount of $400.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const. Art. XXVIII, Section (9)(2)(a).

2. The evidence established that RMF, by expending public moneys to issue the October ballot 5A letter, which urged District electors to vote in favor of ballot issue 5A, committed a violation of Section 1-45-117(1)(a)(I)(C) of the FCPA.

AGENCY DECISION

Therefore, the ALJ imposes a fine against RMF in the amount of $400. The fine shall be paid to the Secretary of State and shall be deposited in the Department of State cash fund created in Section 24-21-104(3), C.R.S.

This Agency Decision is subject to review by the Colorado Court of Appeals pursuant to Section 24-4-106(11), C.R.S. and Colo. Const. Art. XXVIII, Section 9(2)(a).

DONE AND SIGNED
June ____, 2008

JUDITH F. SCHULMAN
Administrative Law Judge

Courtroom 1, digital recording
Complainant's Exhibits 1-4
Respondent's Exhibit A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

Jay Sherritt
443 Wewonka Drive
Boulder, CO 80303

Frederick Huff, Esq.
1225 17th Street, Suite 1530
Denver, CO 80202

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 200
Denver, CO 80202

on this ___ day of _____.

_____
Technician IV